

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34449

JUVENTINO TORREZ-VARGAS,)	2009 Unpublished Opinion No. 391
)	
Petitioner-Appellant,)	Filed: March 20, 2009
)	
v.)	Stephen W. Kenyon, Clerk
)	
STATE OF IDAHO,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Respondent.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Joel D. Horton, District Judge.

Order denying petition for post-conviction relief, affirmed.

Greg S. Silvey, Kuna, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Lori A. Fleming, Deputy Attorney General, Boise, for respondent.

WALTERS, Judge Pro Tem

Juventino Torrez-Vargas shot a police officer and was convicted, after a jury trial, of attempted first degree murder with a sentence enhancement for using a firearm in the commission of the attempted murder. The incident occurred during a traffic stop when Torrez-Vargas fired a pistol at the officer, hitting the officer three times. He received an aggregate twenty-five-year sentence. The judgment of conviction and sentence were upheld in an unpublished opinion of this Court in 2005, *State v. Torrez-Vargas*, Docket No. 31094 (Ct. App. June 27, 2005). This appeal is from the order of the district court dismissing a subsequent application by Torrez-Vargas for post-conviction relief. We affirm.

I.

BACKGROUND

Torrez-Vargas filed an amended application for post-conviction relief that raised seven grounds for relief, all alleging ineffective assistance of trial counsel. At a hearing on June 16, 2007, Torrez-Vargas' post-conviction counsel conceded that four of the claims (nos. 15, 16, 17

and 21) should be summarily dismissed. The district court dismissed those claims pursuant to the state's motion and conducted an evidentiary hearing on the remaining claims in the petition (nos. 18, 19 and 20). Following the hearing, the district court dismissed the amended petition in its entirety. Torrez-Vargas timely appealed from the dismissal order.

Torrez-Vargas asserts that the district court erred in dismissing two of his claims, no. 18 and 19, for post-conviction relief that were addressed at the evidentiary hearing. Specifically, he contends that he presented sufficient evidence to prove that his trial counsel was ineffective for: (1) failing to explore possible plea negotiations with the state; and (2) failing to obtain a psychiatric or psychological report for use at the sentencing proceeding.

II.

STANDARD OF REVIEW

An application for post-conviction relief initiates a proceeding which is civil in nature. *State v. Bearshield*, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); *Clark v. State*, 92 Idaho 827, 830, 452 P.2d 54, 57 (1969); *Murray v. State*, 121 Idaho 918, 921, 828 P.2d 1323, 1326 (Ct. App. 1992). As with a plaintiff in a civil action, the applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. I.C. § 19-4907; *Russell v. State*, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct. App. 1990). If a petitioner fails to present evidence establishing an essential element on which he bears the burden of proof, summary dismissal is appropriate. *Mata v. State*, 124 Idaho 588, 592, 861 P.2d 1253, 1257 (Ct. App. 1993). A trial court's decision that a post-conviction applicant has not met his burden of proof is entitled to great weight. *Sanders v. State*, 117 Idaho 939, 940, 792 P.2d 964, 965 (Ct. App. 1990); *Larkin v. State*, 115 Idaho 72, 74, 764 P.2d 439, 441 (Ct. App. 1988).

Insofar as review of Torrez-Vargas' claim of ineffective counsel, the petitioner must establish that his counsel's performance fell below an objective standard of reasonableness and that there was a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *Aragon v. State*, 114 Idaho 758, 760 P.2d 1174 (1988); *Russell*, 118 Idaho 65, 794 P.2d 654.

III.

DISCUSSION

A. Plea Negotiation Issues

In claim number 19 of his amended application for post-conviction relief, Torres-Vargas alleged that his trial counsel was ineffective for failing to “explore possible plea negotiations with the State.” With respect to this allegation, Torres-Vargas testified that he never asked his trial counsel to pursue a plea bargain with the state, but that he did express a desire to plead guilty rather than having a jury trial. Torres-Vargas’ trial counsel testified that he approached the prosecutor about negotiating a plea bargain, but the prosecutor refused to reduce the charge from attempted first degree murder or to make any particular favorable sentencing recommendation in exchange for Torres-Vargas’ plea to that crime. Trial counsel also testified that he did not believe Torres-Vargas could successfully plead guilty to attempted first degree murder because he refused to admit having the intent to kill the police officer when he fired at the officer. The attorney testified that even if the state had offered to amend the charge to aggravated battery, it would not have been in Torres-Vargas’ best interest to plead guilty to that charge because a conviction for aggravated battery on a police officer would carry a potential punishment greater than would a conviction for attempted first degree murder.

Following the evidentiary hearing, the district court determined that while it was unclear whether Torres-Vargas even requested that plea negotiations be explored by his counsel, there was no evidence that the state would entertain negotiations in any fashion. The court concluded that Torres-Vargas had failed to meet his burden of demonstrating deficient performance on the part of trial counsel and that in the absence of any evidence the state would be inclined to enter into plea negotiations, Torres-Vargas had failed to demonstrate resultant prejudice.

Torres-Vargas argues that the district court’s ruling was erroneous, asserting that sufficient evidence was presented to prove both deficient performance and resultant prejudice. We disagree. It is well established that trial counsel does not have a duty to initiate plea negotiations with the state on a defendant’s behalf. The Sixth Amendment guarantees a criminal defendant effective assistance of counsel in connection with plea negotiations. *Hill v. Lockhart*, 474 U.S. 52, 57-58 (1985). However, there is no constitutional right to a plea bargain. *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977); *Nunes v. Mueller*, 350 F.3d 1045, 1052 (9th Cir. 2003). If the state elects to extend a plea offer to a defendant, defense counsel must communicate the offer and must competently advise the defendant regarding whether to accept it. *Nunes*, 350 F.3d at 1052-53; *Turner v. Calderon*, 281 F.3d 851, 879 (9th Cir. 2002); *United States v. Blaylock*, 20 F.3d 1458, 1466 (9th Cir. 1994). In the absence of such an offer, defense

counsel who otherwise effectively represents a criminal defendant has no obligation to initiate plea negotiations with the state. *See, e.g., Aguilar v. Alexander*, 125 F.3d 815, 820-21 (9th Cir. 1997); *Brown v. Doe*, 2 F.3d 1236, 1246 (2nd Cir. 1993); *Hawkman v. Parratt*, 661 F.2d 1161, 1171 (8th Cir. 1981); *Custodio v. United States*, 945 F. Supp. 575, 579 (S.D.N.Y. 1996) (noting that where “trial counsel’s assistance was otherwise reasonably effective, his counsel’s alleged refusal to pursue plea bargaining opportunities cannot form the basis of an ineffective assistance claim.”).

Moreover, even assuming *arguendo* that Torrez-Vargas’ trial counsel had a duty to pursue plea negotiations with the state, the record in this case supports the district court’s determination that trial counsel did so. The attorney testified, without contradiction, that he approached the prosecutor about a possible plea bargain, but that the prosecutor refused to reduce the charges or to be bound by any particular sentencing recommendation. Because the record shows that trial counsel did the very thing that Torrez-Vargas claims he should have done, Torrez-Vargas failed to carry his burden of proving by a preponderance of the evidence any deficiency in trial counsel’s performance.

Claim number 19 of Torrez-Vargas’ amended petition alleged only that trial counsel was ineffective for “not explor[ing] possible plea negotiations with the State.” Torrez-Vargas expanded this allegation at the evidentiary hearing, testifying that he wanted to plead guilty to the attempted murder charge but that trial counsel advised him not to. The attorney testified that Torrez-Vargas could not have successfully entered a guilty plea because he refused to admit an essential element of the offense -- the intent to kill. The district court agreed with the attorney’s assessment and concluded that Torrez-Vargas had failed to carry his burden of proving either deficient performance or resulting prejudice in relation to his claim.

On appeal, Torrez-Vargas challenges the district court’s legal conclusion that intent to kill is an element of attempted first degree murder. He argues that, because I.C. § 18-4003(b) defines first degree murder as “[a]ny murder of any peace officer,” and because I.C. §§ 18-4001 and 18-4002 together define murder as the unlawful killing of a human being “when the circumstances attending the killing show an abandoned and malignant heart,” Torrez-Vargas could have successfully pled guilty to attempted first degree murder without having to admit that he intended to kill the officer with his shots.

This argument is unavailing. Torrez-Vargas was not charged with *murdering* the police officer. He was charged with *attempting* to murder the officer, a crime which does require as one of its elements a specific intent to kill. *State v. Luke*, 134 Idaho 294, 300, 1 P.3d 795, 801 (2000) (specific intent to kill is one of the elements of attempted murder, even if conviction for the underlying murder would not itself require proof of specific intent). Having failed to prove that he could have successfully pled guilty to attempted first degree murder without admitting an intent to kill, we agree with the district court that Torrez-Vargas failed to carry his burden of proving any deficiency in his trial counsel's advise to plead not guilty and proceed to trial.

B. Psychiatric Report Issue

In paragraph number 18 of his amended post-conviction petition, Torrez-Vargas alleged that his trial counsel was ineffective for failing to “introduce at sentencing a psychiatric report of Torrez-Vargas’ dependence upon and behavior modification caused by alcohol and drugs.” The district court dismissed this claim following the evidentiary hearing, finding that Torrez-Vargas fell “woefully short” of carrying his burden of establishing either deficient performance or resulting prejudice. Contrary to Torrez-Vargas’ assertions on appeal, a review of the applicable law and the record supports the district court’s ruling.

Idaho Code Section 19-2522(1) provides in pertinent part that a district court must appoint a psychiatrist or psychologist to examine and report on the defendant’s mental condition “[i]f there is reason to believe the mental condition of the defendant will be a significant factor at sentencing and for good cause shown.” However, “the decision of trial counsel whether to investigate or present mitigating evidence [in the form of a psychological examination] is assessed for reasonableness, giving deference to counsel’s judgment.” *Richman v. State*, 138 Idaho 190, 193, 59 P.3d 995, 998 (Ct. App. 2002) (citing *Wallace v. Ward*, 191 F.3d 1235, 1247 (10th Cir. 1999)). Trial counsel’s failure to investigate and present evidence concerning a defendant’s mental condition at sentencing will only be deemed deficient performance if the information in trial counsel’s possession should have alerted trial counsel to the need to further investigate the defendant’s mental condition. *Richman*, 138 Idaho at 193-94, 59 P.3d at 998-99. To establish prejudice, a petitioner claiming ineffective assistance of counsel based on trial counsel’s failure to obtain a psychological examination for use at sentencing must establish that, but for the alleged failure, his sentence would have been different. *Id.* at 194, 59 P.3d at 999.

At the evidentiary hearing, Torrez-Vargas testified that he believed his trial counsel rendered deficient performance by failing to introduce a psychiatric report regarding his mental health. He testified that he told his attorney he would like to participate in a psychological evaluation. However, Torrez-Vargas did not allege nor establish that trial counsel had any information in his possession that would have alerted him of the need to investigate Torrez-Vargas' mental condition. To the contrary, Torrez-Vargas testified that he had never been diagnosed with any mental illness, that he had never been prescribed any medication for any mental illness or disorder, and that he had never sought treatment for any mental disorder. Although he testified that he believed a psychiatric report might have shown that his use of drugs and alcohol affected his mental health, he did not introduce into evidence any expert testimony or psychological report to support his claim. Having failed to present any evidence to establish either that trial counsel was aware of any information that would have alerted him to further investigate Torrez-Vargas' mental condition, or that Torrez-Vargas actually suffered from a mental condition that would have affected the outcome of the proceeding, Torrez-Vargas failed to establish that trial counsel was ineffective for not obtaining a psychological evaluation for use at sentencing. Accordingly, the district court correctly denied relief with respect to this claim.

IV.

CONCLUSION

The district court did not err in dismissing Torrez-Vargas' amended application for post-conviction relief. The order of dismissal is affirmed.

Chief Judge LANSING and Judge PERRY **CONCUR.**